

1982 WL 189081 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 19, 1982

***1 Re: Application of the Administrative Procedures Act to the Provision Under Section 11-35-4410 Governing the Procurement Review Panel**

The Honorable Hugh K. Leatherman
Chairman
Procurement Review Panel
P.O. Box 142
Columbia, SC 29202

Dear Senator Leatherman:

The South Carolina Consolidated Procurement [Code, Section 11-35-4410](#), provides for the creation of a Procurement Review Panel. The Panel is charged by statute with the responsibility of providing an administrative review of formal protests of decisions arising from the solicitation and award of contracts, debarment or suspension, contract controversies and controversies concerning the expenditures of State funds. Pursuant to [Section 11-35-4410\(5\)](#), the Panel is given the authority to interview any persons deemed necessary, to review all appealed decisions rendered by the Chief Procurement Officer, to record its determinations concerning those appeals, and to report those determinations to the South Carolina Budget and Control Board. Pursuant to statutory requirement, [Section 11-35-4410\(6\)](#), once the Chief Procurement Officer has forwarded a protest to the Review Panel, the Chairman must convene the entire Review Panel within ten (10) days “to conduct an administrative review of the determination rendered....” Following the administrative review, the Panel then has thirty (30) days in which to make a report of its findings to the Budget and Control Board. The Budget and Control Board may then affirm, alter, or deny the decision of the Review Panel.

The Procurement Review Panel is, as stated above, charged with the mandatory responsibility of providing “an administrative review” of formal protests of decisions arising from the procurement process. Article 17 of the Procurement Code, entitled Legal and Contractual Remedies, establishes the procedure by which any aggrieved bidder, offeror, contractor, or subcontractor may protest the solicitation or award of a State contract. This procedure involves an appearance before the appropriate Chief Procurement Officer who must hear the protest and render a decision within ten (10) days of the hearing. The decision of the Chief Procurement Officer is final, unless appealed to the Procurement Review Panel within ten (10) days of the receipt of the decision by the aggrieved party. The South Carolina Administrative Procedures Act, Section 1-23-310, et seq. applies to any State board, department, commission, or officer authorized by law to determine contested cases. A “contested case” is defined under Section 1-23-310(2) as including any proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing. In view of the language under the Consolidated Procurement Code requiring an administrative review of appealed protest decisions arising from procurement activities, it is the opinion of this Office that this type of review would fall within the “contested case” definition established under the Administrative Procedures Act. Therefore, the Administrative Procedures Act, together with all of its requirements in regard to notice and hearings in contested cases must be followed. Section 1-23-320 of the Administrative Procedures Act requires that all parties be afforded an opportunity for hearing after notice of not less than thirty (30) days; however, since the Procurement Code requires a hearing within ten (10) days, a ten (10) day notice would be mandated. Both time requirements may be accommodated by utilizing the attached time chart. The Notice of Hearing to all parties must include:

- *2 1) A statement of the time, place and nature of the hearing;
- 2) A statement of the legal authority and jurisdiction in which the hearing is to be held;

- 3) A reference to the particular sections of the statutes and rules involved;
- 4) A short and plain statement of the matters asserted.

This notice may be limited to a statement of the issues involved or may be a more elaborate recital of the issues before the Review Panel. Under the Administrative Procedures Act, any party to the proceedings may take depositions of witnesses and the Panel may issue subpoenas for the attendance and testimony of any witnesses and for the production and examination of any books, papers or records which the Panel feels necessary or which are requested by any party to the case. These notice requirements afford an opportunity to all parties involved to respond and to present evidence and arguments on all issues to the Review Panel. The Panel must cause a record to be made of the proceedings before it and, under the Administrative Procedures Act, Section 1-23-320(g), the record in a contested case must include:

- 1) All pleadings, motions, intermediate rulings and depositions;
- 2) Evidence received or considered;
- 3) A statement of matters officially noticed;
- 4) Questions and offers of proof, objections and rulings thereon;
- 5) Proposed findings and exceptions; and,
- 6) Any decision, opinion or report by the officer presiding at the hearing.

Section 1-23-320(h) requires that all oral proceedings must be transcribed, if so requested by any party. It is extremely important to note that findings of fact by the Procurement Review Panel must be based exclusively on the evidence and on matters officially noticed. "Matters officially noticed" encompasses notice taken of judicially cognizable facts and any generally recognized technical or scientific facts within the specialized knowledge of the Panel.

The Procurement Review Panel will, in effect, be sitting as a Board of Contract Appeals and, as such, the Rules of Evidence, as applied in civil cases in the Court of Common Pleas, must be followed. Irrelevant, immaterial, or unduly repetitious evidence must be excluded from the proceeding. All rules of privilege recognized by law must be followed and all objections made by any parties to offers of evidence must be made before the Panel at the appropriate time and must be noted in the record. Documentary evidence may be received in the form of copies where the original is not available and all parties must be afforded the opportunity to examine and cross-examine witnesses.

The fact that the final decision is to be made by the Budget and Control Board does not require that a full hearing must again be held before the Board. The record of the administrative review hearing should be forwarded to the Budget and Control Board and all the requirements of the Administrative Procedures Act complied with. The Review Panel Decision should be in writing and should include findings of fact and conclusions of law separately stated. The findings of fact should be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

***3** As the South Carolina Procurement [Code, Section 11-35-4410](#), requires that the Chairman convene the Review Panel within ten (10) days to conduct an Administrative Review of the determinations on appeal from the findings of the Chief Procurement Officer, a quorum of the Review Panel must hear all matters, unless the Code is amended to allow for the appointment of a hearing officer.

I sincerely hope that this basic outline of responsibilities will be of assistance to you.

Sincerely,

Judith Evans Finuf
Assistant Attorney General
Richard P. Wilson
Assistant Attorney General

ATTACHMENT A

PROTEST PROCEDURES TIME TABLE

1. Solicitation or Award of contract

10 days (30 day maximum from Notice of Contract Award)

2. Written protest with appropriate Chief Procurement Officer

10 days

3. Written decision by Chief Procurement Officer stating reasons for action taken

10 days Written Request for Review stating Grievance by appropriate party to the Procurement Review Panel filed with Chief Procurement Officer

4. Review of Decision of Chief Procurement Officer by Attorney General's Office

20 days (APA requires 30 days Notice of an Opportunity for Hearing)

Chief Procurement Officer forwards Grievance to the Procurement Review Panel with Notice of Hearing within 10 days to all parties

10 days

5. Panel convenes for Administrative Review of Chief Procurement Officer's determination

30 days

6. Procurement Review Panel reports its determination to the Budget and Control Board

Reasonable Time

7. Notice of Budget and Control Board Decision issued to all parties

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